FILED

97 . 124 JUL 18 1997

OFFICE OF THE CLERK

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
LONNIE C. SIMMONS
DI TRAPANO & JACKSON
604 Virginia Street, East
Charleston, WV 25301
(304) 342-0133

ROBERT C. BONNER
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

69 pp

QUESTIONS PRESENTED

I. Whether a requirement that out-of-state civil defendants post a bond securing the judgment as a prerequisite to a state court's consideration of an appeal from a fully executable judgment is unconstitutional.

II. Whether due process prohibits a state court's exercise of personal jurisdiction based solely on an out-of-state defendant's placement of a telephone directory advertisement in the forum state.

III. Whether the $5 million punitive damages award against petitioner should be vacated and remanded for reconsideration in light of this Court's decision in *BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589 (1996).

PARTIES INVOLVED AND RULE 29.6 STATEMENT

In addition to the parties identified in the caption of the case, the following persons were parties in the court below: Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty. None of the parties in the court below or in this Court is a corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES INVOLVED AND RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED .. 2
STATEMENT 2
I. The Adoption Of Baby Boy Conaty 3
II. The Adoption-Related Litigation 4
III. The Underlying Appeal And The Imposition Of The "Appeal Bond" Requirement 5
REASONS FOR GRANTING THE PETITION 7
I. A Requirement That A Civil Defendant Post A Bond As A Prerequisite To An Appeal From An Executable Judgment Is Unconstitutional 8
A. Due Process Prohibits Requiring A Bond As A Prerequisite To An Appeal Of An Executable Judgment 9
B. The Imposition Of A Bond Requirement As A Prerequisite To Appealing An Executable Judgment Is Irreconcilable With This Court's Appeal Bond Precedents 15
C. The Bond Requirement Is Irreconcilable With This Court's Precedents Regarding Access To The Appellate Process 19

D. Requiring Only Out-Of-State Defendants To Post A Bond As A Prerequisite To An Appeal Violates The Commerce Clause And The Privileges And Immunities Clause 21
II. The Due Process Clause Prohibits The Exercise Of Personal Jurisdiction Based Only On A Single Telephone Directory Advertisement 24
III. The Judgment Should Be Vacated, And The Case Remanded, For Consideration Of The Punitive Damages Award In Light Of *BMW* 27
CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Allers v. *Willis*, 643 P.2d 592 (Mont. 1982) 10
Angel v. *Bullington*, 330 U.S. 183 (1947) 23
Armstrong v. *Armstrong*, 354 S.E.2d 350 (N.C. App. 1987) 10
BMW of North America, Inc. v. *Gore*, 116 S. Ct. 1589 (1996) ..... *passim*
BMW of North America, Inc. v. *Gore*, No. 1920324, 1997 WL 233910 (Ala. May 9, 1997) 13
Balloon Bouquets, Inc. v. *Balloon Telegram Delivery, Inc.*, 466 N.E.2d 523 (Mass. App. 1984) 27
Bendix Autolite Corp. v. *Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988) 22
Berryman v. *Ardery*, 398 S.W.2d 237 (Ky. App. 1966) 10
Blair v. *Stump*, 617 P.2d 791 (Ariz. App. 1980) 19
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 12
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 20
Bonde v. *Stern*, 8 N.W.2d 457 (N.D. 1943) 10
Burnham v. *Superior Court*, 495 U.S. 604 (1990) 25
Burns v. *Ohio*, 360 U.S. 252 (1959) 24
Castilleja v. *Camero*, 402 S.W.2d 272 (Tex. Civ. App. 1966) 10

Charlie Fowler Evangelistic Ass'n v. *Cessna Aircraft Co.*, 911 F.2d 1564 (11th Cir. 1990) 26
Christenson v. *Cudahy Packing Co.*, 257 P. 906 (Cal. App. 1927) 10
Circus Circus Hotels, Inc. v. *Superior Court*, 120 Cal. App. 3d 546 (1981) 26
Citizens Auto. Inter-Insurance Exch. v. *Andrus*, 212 P.2d 406 (Idaho 1949) 10
Compton v. *Naylor*, 392 F. Supp. 575 (N.D. Tex. 1975) 18
Connecticut v. *Doehr*, 501 U.S. 1 (1991) 11-12
Continental Trend Resources, Inc. v. *OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996) 14
Cubbage v. *Merchent*, 744 F.2d 665 (9th Cir. 1984) 26
District of Columbia v. *Clawans*, 300 U.S. 617 (1937) 12-13
In re Farrell Lines, Inc., 761 F.2d 796 (D.C. Cir. 1985) 10
Foremost Ins. Co. v. *Parham*, 693 So. 2d 409 (Ala. 1997) 14
Ex parte French, 100 U.S. 1 (1879) 9
Gasperini v. *Center for Humanities, Inc.*, 116 S. Ct. 2211 (1996) 13
Gregory v. *Grove*, 547 P.2d 381 (Okla. 1976) 27
Grezaffi v. *Smith*, 641 So. 2d 210 (La. App. 1994) 10
Griffin v. *Illinois*, 351 U.S. 12 (1956) 19
Hammerstein v. *Superior Court*, 341 U.S. 491 (1951) 24

Helicopteros Nacionales de Colombia, S.A. v. *Hall*, 466 U.S. 408 (1984) 25
Honda Motor Co. v. *Oberg*, 512 U.S. 415 (1994) 11,12,13,14
Horn v. *Horn*, 73 So. 2d 905 (Fla. 1954) 10
Hudgins v. *Kemp*, 59 U.S. 530 (1856) 9
Hull v. *Gamblin*, 241 A.2d 739 (D.C. App. 1968) 27
Hurtado v. *California*, 110 U.S. 516 (1884) 11
Hyman v. *Leathers*, 308 S.E.2d 388 (Ga. App. 1983) 10
Jack Spring, Inc. v. *Little*, 280 N.E.2d 208 (Ill. 1972) 19
Kennedy v. *Ziesmann*, 526 F. Supp. 1328 (E.D. Ky. 1981) 26
Kimzey v. *Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) 13
Landgraf v. *USI Film Prods., Inc.*, 511 U.S. 244 (1994) 28
Lecates v. *Justice of the Peace Court*, 637 F.2d 898 (3d Cir. 1980) 18
Lee v. *Edwards*, 101 F.3d 805 (2d Cir. 1996) 14
Life Ins. Co. of Georgia v. *Johnson*, 117 S. Ct. 288 (1996) 29
Lindsey v. *Normet*, 405 U.S. 56 (1972) 15-18
M.L.B. v. *S.L.J.*, 117 S. Ct. 555 (1996) 20,21
Markel v. *Transamerica Title Ins. Co.*, 442 P.2d 97 (Ariz. 1968) 10
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 11,12
Mayer v. *Chicago*, 404 U.S. 189 (1971) 20

Meltzer v. *C. Buck LeCraw & Co.*, 402 U.S. 954 (1971) 20
Merchants Ass'n v. *Conger*, 606 P.2d 125 (Mont. 1979) 19
Mitchell v. *Dexter Interiors*, 381 So. 2d 90 (Ala. Civ. App. 1980) 10
Monks v. *Hemphill*, 203 P.2d 503 (Colo. 1949) 10
Munley v. *District Court*, 761 P.2d 414 (Nev. 1988) 26
National Union of Marine Cooks & Stewards v. *Arnold*, 348 U.S. 37 (1954) 17
Newman v. *Gates*, 204 U.S. 89 (1907) 24
OXY USA Inc. v. *Continental Trend Resources, Inc.*, 116 S. Ct. 1843 (1996) 29
Pacific Mut. Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 12
Parris v. *Garner Commercial Disposal, Inc.*, 253 S.E.2d 29 (N.C. App. 1979) 27
Patterson v. *Old Dominion Trust Co.*, 140 S.E. 810 (Va. App. 1927) 10
Patterson v. *Warner*, 415 U.S. 303 (1974) 19
People ex rel. McKnight v. *Chicago Title & Trust Co.*, 107 N.E. 198 (Ill. 1914) 10
Quillen v. *Twin City Bank*, 485 S.W.2d 181 (Ark. 1972) 10
Quintana v. *Knowles*, 827 P.2d 97 (N.M. 1992) 10
Rinaldi v. *Yeager*, 384 U.S. 305 (1966) 20
In re R.M.J., 455 U.S. 191 (1982) 26
Robertson v. *Goldman*, 369 S.E.2d 888 (W. Va. 1988) 14
Ryan v. *Plath*, 140 P.2d 968 (Wash. 1943) 10

Scheidt v. *Young*, 389 F.2d 58 (3d Cir. 1968) 26-27
Shippen v. *Parrott*, 553 N.W.2d 503 (S.D. 1996) 14
Shulenberg v. *Signatrol, Inc.*, 226 N.E.2d 624 (Ill. 1967) 10
Siskind v. *Villa Foundation for Educ., Inc.*, 642 S.W.2d 434 (Tex. 1982) 26
Spring v. *Spring*, 229 N.W. 147 (Iowa 1930) 10
State ex rel. Shenandoah Valley Nat'l Bank v. *Hiett*, 32 S.E.2d 869 (W. Va. 1945) 8
TXO Production Corp. v. *Alliance Resources Corp.*, 509 U.S. 443 (1993) 13
Tooker v. *Missouri Power & Light Co.*, 80 S.W.2d 691 (Mo. 1935) 10
Tourville v. *Tourville*, 185 N.W.2d 281 (Minn. 1971) 10
Twining v. *New Jersey*, 211 U.S. 78 (1908) 11
Van Pelt v. *Best Workover, Inc.*, 798 S.W.2d 14 (Tex. App. 1990) 26
Wells Fargo Credit Corp. v. *Ziegler*, 780 P.2d 703 (Okla. 1989) 10
Willey v. *W.J. Hoggson Corp.*, 105 So. 126 (Fla. 1925) 10
Wright v. *Fields*, 313 N.W.2d 902 (Mich. 1981) 15
Younger v. *Mitchell*, 777 P.2d 789 (Kansas 1989) 10
Zauderer v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) 26
Zinermon v. *Burch*, 494 U.S. 113 (1990) 20

STATUTES

28 U.S.C. § 1257 2
28 U.S.C. § 2403(b) 2
W. Va. Code §§ 58-5-9 5
W. Va. Code § 58-5-10 5
W. Va. Code § 58-5-14 8
W. Va. R. App. P. 6 8

MISCELLANEOUS

5 Am. Jur. 2d *Appellate Review* § 442 (1995) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-

DAVID KEENE LEAVITT,

Petitioner,

v.

JOHN WOODRUFF KESSEL,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Keene Leavitt respectfully petitions this Court for a writ of certiorari to review a final order of the Supreme Court of Appeals of West Virginia.

OPINIONS BELOW

The order of the Supreme Court of Appeals of West Virginia, App., *infra*, 23a, is not reported. The judgment of the Circuit Court of Cabell County, West Virginia, App., *infra*, 1a-4a, also is not reported.

JURISDICTION

The order of the Supreme Court of West Virginia was entered on March 20, 1997. App., *infra*, 23a. On May 29, 1997, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 18, 1997. The jurisdiction of this Court is

invoked under 28 U.S.C. § 1257. The Attorney General of West Virginia has been notified of the challenge to the actions of the court below by service of a copy of this petition. *Cf.* 28 U.S.C. § 2403(b) and this Court's Rule 29.4(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3) provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Privileges and Immunities Clause of the United States Constitution (Art. IV, § 2, cl. 1) provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case arose out of the adoption of a child fathered by respondent John Woodruff Kessel. Petitioner Leavitt, a California adoption attorney, arranged the adoption on behalf of the child's mother, Anne Conaty. Mr. Kessel subsequently brought suit challenging acts related to the adoption. Following a jury trial in the Circuit Court of Cabell County, West Virginia, Mr. Leavitt was found liable for fraud and tortious interference with a parental relationship. He was or-

dered to pay $2 million in compensatory damages and $5 million in punitive damages. App., *infra*, 1a-4a. Although the judgment against Mr. Leavitt has at all times been fully executable, and Mr. Kessel has in fact attempted to enforce it in Virginia and California, the Supreme Court of Appeals of West Virginia dismissed Mr. Leavitt's appeal based on his refusal to post an "appeal bond" for $7 million (later reduced to $1.1 million). App., *infra*, 23a.

I. The Adoption Of Baby Boy Conaty

Anne Conaty and respondent Kessel, who both lived at the time in Huntington, West Virginia, had an on-again, off-again relationship for several years prior to 1990. Tr. 1841-42, 1987, 2004-08, 2034-35. Ms. Conaty learned that she was pregnant in November 1990, and she informed Mr. Kessel of her pregnancy on December 1, 1990. Tr. 2010, 2104. Ms. Conaty and Mr. Kessel were engaged to be married on December 31, 1990, but the engagement was called off in January 1991. Tr. 2022, 2028-30. Later that month, Ms. Conaty left West Virginia. Tr. 1138, 1579, 2040. At that time, she decided to have the baby and either raise it herself or place it for adoption. Tr. 1580.

For about three months, Ms. Conaty stayed with friends and family in Iowa, Tennessee, and North Carolina. Tr. 2041-42. In April 1991, Ms. Conaty was referred to petitioner Leavitt, a 1953 graduate of Stanford Law School who has concentrated on adoption law for most of his professional career. In May 1991, Ms. Conaty went to Minnesota to stay with a relative. Tr. 1619, 1873-74, 2048. While she was there, she decided to place the baby for adoption. Tr. 1619, 2056. She contacted Mr. Leavitt to arrange for the adoption on May 20, 1991. Tr. 1620, 2062. She moved to California for the final months of her pregnancy. Tr. 2064-65. On July 24, 1991, Ms. Conaty

gave birth in a Los Angeles hospital to a healthy baby boy. The following day, Ms. Conaty released custody of the baby to a married couple from Alberta, Canada who had agreed to adopt him.

II. The Adoption-Related Litigation

On June 3, 1991, Mr. Kessel filed an inverse paternity action in West Virginia state court. *Kessel* v. *Conaty*, No. 91-C-871 (Circuit Court of Cabell County, West Virginia). On June 26, the court issued an *ex parte* temporary injunction "prohibiting [Ms. Conaty] from placing her unborn child for adoption by anyone . . . until the paternity of [Mr. Kessel] can be established or refuted." PX 17. The effective date of service of the complaint, and thus the injunction, was July 26, 1991 (after the baby had been placed for adoption). PX 49. On August 6, 1991, Mr. Kessel's attorney telephoned Mr. Leavitt and informed him of the temporary injunction entered by the West Virginia court, and she sent a letter with a copy of the complaint and order the next day. Tr. 1013-14. On October 3, 1991, the West Virginia court entered a default judgment finding Mr. Kessel to be the father of Ms. Conaty's child. PX 49.

On November 26, 1991, Mr. Kessel filed an action in California state court seeking damages on various tort theories arising out of the placement of Ms. Conaty's baby for adoption. *Kessel* v. *Conaty et al.*, No. BC-043-140 (Superior Court of Los Angeles County, California). The action subsequently was dismissed at Mr. Kessel's request. Tr. 829.

On March 3, 1992, Mr. Kessel filed an action contesting the adoption of Ms. Conaty's baby in a Canadian court. After a hearing at which Mr. Kessel was represented, the court dismissed all of his claims, including his request for guardianship, and approved the

adoption. The Canadian court subsequently appointed the adopting couple as the sole guardians of the baby.

This case began in July 1992, when respondent Kessel sued Ms. Conaty, as well as her mother, her father, her brother, and Mr. Leavitt, in West Virginia state court for fraud and tortious interference with a parental relationship. The state-court jury returned a verdict for Mr. Kessel and awarded him $2 million in compensatory damages and $5.85 million in punitive damages. App., *infra*, 1a-4a. Mr. Leavitt is jointly liable for the full amount of compensatory damages, and is solely liable for $5 million of the punitive damages award.

III. The Underlying Appeal And The Imposition Of The "Appeal Bond" Requirement

Mr. Leavitt and the Conatys petitioned the West Virginia Supreme Court of Appeals for leave to appeal. In addition to a number of state-law contentions, including the fundamental objection that Mr. Kessel had failed to prove any cause of action under West Virginia law, they argued that the trial court had no personal jurisdiction over Mr. Leavitt, who had never been to West Virginia and had no jurisdictionally significant contacts with that State, and that the punitive damages were unconstitutionally excessive. The West Virginia Supreme Court of Appeals granted all of the defendants leave to appeal. App., *infra*, 13a-14a. Under West Virginia law, the acceptance of an appeal demonstrates that the appellate court "is of opinion that the decision complained of ought to be reviewed" and that the judgment is not "plainly right." W. Va. Code §§ 58-5-9 & 58-5-10.

On December 28, 1995, the trial court required Mr. Leavitt to post a $7 million bond to stay execution of the judgment against him. App., *infra*, 12a. The trial court did not require the Conatys, who disclosed their

assets and agreed not to dispose of them pending appeal, to post bond to stay the judgments against them.

Mr. Leavitt declined to post a supersedeas bond, leaving the judgment executable. Mr. Kessel therefore was free to use any remedies available to him to collect on the judgment obtained against Mr. Leavitt. And, in fact, Mr. Kessel attempted to execute against the judgment in Virginia, where some of Mr. Leavitt's assets are located. That effort was unsuccessful because, under Virginia law, Mr. Leavitt's assets in that State are exempt from attachment by judgment creditors.

Mr. Kessel also entered abstracts of judgment in the California counties in which Mr. Leavitt held property, creating liens against that property. Although Mr. Kessel entered the West Virginia judgment itself in a California court, that court rejected Mr. Kessel's attempt to levy against Mr. Leavitt's assets on the ground that the West Virginia judgment was void because the trial court lacked personal jurisdiction over Mr. Leavitt. *Kessel* v. *Leavitt*, No. SS-006-478 (Superior Court of Los Angeles County, California); *see* App., *infra*, 24a-27a. An appeal is pending in the California litigation.

Frustrated in his attempt to levy on Mr. Leavitt's assets in Virginia and California, Mr. Kessel asked the West Virginia Supreme Court of Appeals to condition Mr. Leavitt's appeal on the posting of a bond. On January 16, 1997, after leave to appeal had been granted and the briefs on the merits had been filed, that court ordered Mr. Leavitt to post a $7 million bond, warning that "[f]ailure to comply will result in the dismissal of appellant David Keene Leavitt's appeal in this Court." App., *infra*, 15a-16a. Mr. Leavitt filed a motion for reconsideration of the bond requirement, pointing out that it was unauthorized by statute or court rule and that it vastly exceeded Mr. Leavitt's financial resources, and specifically arguing that the imposition

of a bond under these circumstances violated his federal constitutional rights. The West Virginia Supreme Court of Appeals reduced the bond requirement to $1.1 million. App., *infra*, 19a-20a.

Mr. Leavitt again moved for reconsideration, stating that he could not afford to post the required bond and reiterating his arguments that the application of the bond requirement to him was both unauthorized and unconstitutional. Mr. Leavitt filed with the Supreme Court of Appeals a declaration listing all of his assets, as well as documents indicating that Mr. Kessel had filed liens against those assets in California, demonstrating that he could not afford to post a $1.1 million bond. The motion for reconsideration was denied. App., *infra*, 21a-22a.

On March 20, 1997, after all briefs had been filed and oral argument had been held on the merits of the appeal, the Supreme Court of Appeals of West Virginia dismissed Mr. Leavitt's appeal on the sole ground that he had failed to post a bond to appeal from a judgment that had never been stayed. App., *infra*, 23a. Although the Conaty defendants also did not post any bonds, the West Virginia Supreme Court of Appeals did not dismiss their appeals. That court has not yet issued a decision with respect to the challenges to the trial court judgment raised by the Conatys.

REASONS FOR GRANTING THE PETITION

Mr. Leavitt is a victim of a state civil justice system that is capriciously destroying litigants' constitutional rights. As a result of his helping an unmarried woman place her newborn baby for adoption, an event that took place entirely in California, Mr. Leavitt has been ordered to pay millions of dollars in compensatory and punitive damages by a West Virginia court that did not have personal jurisdiction over him for actions that

were not unlawful. For the following reasons, this Court should grant the petition for a writ of certiorari to review the unconstitutional judgment below.

I. A Requirement That A Civil Defendant Post A Bond As A Prerequisite To An Appeal From An Executable Judgment Is Unconstitutional

The Supreme Court of Appeals of West Virginia dismissed Mr. Leavitt's appeal without even considering the merits of his substantial constitutional and state-law challenges. That dismissal was based solely on the court's unwarranted and unauthorized requirement that Mr. Leavitt post an "appeal bond" to secure the judgment amount even though Mr. Leavitt has never sought a stay of the judgment against him and Mr. Kessel in fact initiated enforcement proceedings in the States where Mr. Leavitt's assets are located.[1] The "appeal bond" requirement imposed by the West Virginia Supreme Court of Appeals against Mr. Leavitt as a precondition to considering his appeal violated his rights

---

[1] No West Virginia statute or rule authorizes the imposition of an "appeal bond" in these circumstances. West Virginia Rule of Appellate Procedure 6 allows the appellate court to condition a stay pending appeal on the filing of an appropriate bond. Mr. Leavitt did not obtain such a stay. West Virginia Code Section 58-5-14 allows the appellate court to require a bond to secure the judgment only "[i]f a supersedeas be awarded." No supersedeas was obtained in this case, and the courts of West Virginia have "no authority to prescribe or require additional conditions" of a bond. *State ex rel. Shenandoah Valley Nat'l Bank* v. *Hiett*, 32 S.E.2d 869, 874 (W. Va. 1945). Thus, the imposition of the "appeal bond" requirement against Mr. Leavitt was nothing other than an arbitrary and unjustified exercise of governmental power by the West Virginia Supreme Court of Appeals.

secured by the Due Process, Equal Protection, Commerce, and Privileges and Immunities Clauses.

A. Due Process Prohibits Requiring A Bond As A Prerequisite To An Appeal Of An Executable Judgment

Mr. Leavitt has never attempted to stay execution of the judgment against him, and Mr. Kessel has in fact attempted to levy against Mr. Leavitt's assets in Virginia and California. Yet the West Virginia Supreme Court of Appeals dismissed Mr. Leavitt's appeal for failure to post a bond securing the amount of the judgment against him.[2] That order conflicts with the well-established principle that "[a] party need not obtain a stay of judgment, nor file a supersedeas bond, in order to take or prosecute an appeal. *Failure to file such a bond is not grounds for dismissal of the appeal*, but simply removes the supersedeas aspect of the appeal and leaves the party who obtained the judgment free to execute on the judgment." 5 Am. Jur. 2d *Appellate Review* § 442 (1995) (footnotes omitted; emphasis added).

This Court expressly recognized more than 140 years ago that a litigant's failure to post a bond securing the judgment is not a basis for dismissing an appeal. *Hudgins* v. *Kemp*, 59 U.S. 530, 535 (1856) ("his omission to give the security . . . is no ground for dismissing the appeal"); *see also Ex parte French*, 100 U.S. 1, 5 (1879) (holding that a writ of error can be prosecuted even if the judgment under review is not

---

[2] The original bond amount was $7 million, the entire amount of the judgment for which Mr. Leavitt is jointly and severally liable. The court later required Mr. Leavitt to post a $1.1 million bond, calculated as 55 percent (his proportionate fault as found by the jury) of the $2 million compensatory damages award.

superseded by the posting of a bond). It is an "elementary principle of appellate procedure, with which all would agree, that a review on the merits is not precluded by appellant's decision not to seek a stay of proceedings pending appeal by exercising his right not to file a supersedeas bond." *Tourville* v. *Tourville*, 185 N.W.2d 281, 282 (Minn. 1971). This principle has uniformly been followed by the courts of this Nation.[3] The first question presented is whether the West

---

[3] *See, e.g., In re Farrell Lines, Inc.*, 761 F.2d 796 (D.C. Cir. 1985); *Grezaffi* v. *Smith*, 641 So. 2d 210, 215 (La. App. 1994); *Quintana* v. *Knowles*, 827 P.2d 97, 99 (N.M. 1992); *Younger* v. *Mitchell*, 777 P.2d 789, 792-93 (Kansas 1989); *Wells Fargo Credit Corp.* v. *Ziegler*, 780 P.2d 703, 706 (Okla. 1989); *Armstrong* v. *Armstrong*, 354 S.E.2d 350, 352 (N.C. App. 1987); *Hyman* v. *Leathers*, 308 S.E.2d 388, 390 (Ga. App. 1983); *Allers* v. *Willis*, 643 P.2d 592, 597 (Mont. 1982); *Mitchell* v. *Dexter Interiors*, 381 So. 2d 90, 91 (Ala. Civ. App. 1980); *Quillen* v. *Twin City Bank*, 485 S.W.2d 181, 183 (Ark. 1972); *Markel* v. *Transamerica Title Ins. Co.*, 442 P.2d 97, 106-07 (Ariz.), *cert. denied*, 393 U.S. 999 (1968); *Shulenberg* v. *Signatrol, Inc.*, 226 N.E.2d 624, 629 (Ill. 1967); *Berryman* v. *Ardery*, 398 S.W.2d 237, 238 (Ky. App. 1966); *Castilleja* v. *Camero*, 402 S.W.2d 272, 275 (Tex. Civ. App. 1966), *aff'd*, 414 S.W.2d 431 (Tex. 1967); *Horn* v. *Horn*, 73 So. 2d 905, 906 (Fla. 1954); *Monks* v. *Hemphill*, 203 P.2d 503, 503-04 (Colo. 1949); *Citizens Auto. Inter-Insurance Exch.* v. *Andrus*, 212 P.2d 406, 409 (Idaho 1949); *Bonde* v. *Stern*, 8 N.W.2d 457, 461 (N.D. 1943); *Ryan* v. *Plath*, 140 P.2d 968, 976 (Wash. 1943); *Tooker* v. *Missouri Power & Light Co.*, 80 S.W.2d 691, 693 (Mo. 1935); *Spring* v. *Spring*, 229 N.W. 147, 149 (Iowa 1930); *Patterson* v. *Old Dominion Trust Co.*, 140 S.E. 810, 813 (Va. App. 1927), *modified*, 141 S.E. 759 (Va. 1928); *Christenson* v. *Cudahy Packing Co.*, 257 P. 906, 906-07 (Cal. App. 1927); *Willey* v. *W.J. Hoggson Corp.*, 105 So. 126, 128 (Fla. 1925); *People ex rel. McKnight* v. *Chicago Title & Trust Co.*, 107 N.E. 198, 200 (Ill. 1914).

Virginia Supreme Court of Appeals violated Mr. Leavitt's constitutional rights by departing from this long-settled rule.

The Constitution does not *ipso jure* preclude individual States from establishing procedures that differ from the generally accepted norm. *Hurtado* v. *California*, 110 U.S. 516, 528-29 (1884). But this Court has made clear that a State's deviation from traditional procedures carries a presumption of unconstitutionality:

> [C]onsistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to the process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

Twining v. *New Jersey*, 211 U.S. 78, 101 (1908).[4]

The Court has determined that the three-part inquiry outlined in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), is the appropriate standard by which to judge the constitutionality of a State's departure from established procedures in civil cases. *See*, *e.g.*, *Connecticut* v.

---

[4] A challenge to a State's deviation from generally accepted procedures rarely will involve a direct conflict among judicial decisions because the courts in States following the traditional rule will have no reason to opine on the constitutionality of any other rule. This Court has not hesitated, however, to exercise its certiorari jurisdiction in such circumstances. For example, this Court recently concluded that Oregon's refusal to allow judicial review of punitive damages, which stood in marked contrast to the procedures applicable in all other States, warranted review and, indeed, violated due process. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994).

Doehr, 501 U.S. 1, 9-11 (1991); *id.* at 30-31 (Scalia, J., concurring). The factors relevant in determining whether the West Virginia Supreme Court of Appeals' aberrational bond requirement violated due process are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Consideration of these three elements demonstrates that the West Virginia court violated the Due Process Clause by ordering Mr. Leavitt to post a bond as a prerequisite to reviewing a fully executable judgment.

First, the private property interest at stake is "enormous." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting). Money is a core property interest. *Board of Regents* v. *Roth*, 408 U.S. 564, 571-72 (1972). Defendants in civil actions brought in West Virginia have an obvious and substantial interest in assuring that multimillion-dollar awards of damages, particularly punitive damages, are not erroneously assessed against them. *See Honda*, 512 U.S. at 434-35 ("A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment").

Second, requiring an "appeal bond" as a prerequisite to appellate review of an executable judgment creates a significant risk of erroneous deprivation. Although the Court has said that States are not constitutionally required to provide an appeal, *see*, *e.g.*, *District of Co-*

lumbia v. *Clawans*, 300 U.S. 617, 627 (1937), this Court repeatedly has stressed the constitutional importance of appellate review of punitive damages:

> In *Haslip*, the Court held that the common-law method of assessing punitive damages did not violate procedural due process. In so holding, the Court stressed the availability of *both* meaningful and adequate review by the trial court *and subsequent appellate review*. Similarly, in *TXO [Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993)], the plurality opinion found that the fact that the award was reviewed and upheld by the trial judge *and unanimously affirmed on appeal* gave rise to a strong presumption of validity.

Honda, 512 U.S. at 420-21 (emphasis added; internal quotation and citations omitted). The Court also has recognized the significance of appellate review of compensatory damages. *Gasperini* v. *Center for Humanities, Inc.*, 116 S. Ct. 2211, 2222-25 (1996).

The importance of appellate review of punitive damages was underscored by this Court's recent decision in *BMW of North America, Inc.* v. *Gore*, 116 S. Ct. 1589 (1996), which established three "guideposts" to be applied by courts reviewing punitive damages awards. In *BMW* itself, on remand from this Court, the Supreme Court of Alabama remitted the $2,000,000 punitive damages award entered by the trial court to $50,000. *BMW of North America, Inc.* v. *Gore*, No. 1920324, 1997 WL 233910 (Ala. May 9, 1997). In the wake of *BMW*, appellate courts across the Nation have significantly reduced awards of punitive damages that had been affirmed by trial courts.[5] Yet the mul-

---

[5] *See, e.g.*, *Kimzey* v. *Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) (jury award of $50,000,000 remitted by trial

timillion-dollar punitive damages award against Mr. Leavitt has never been reviewed, by any court, in light of this Court's decision in *BMW*.

The "appeal bond" requirement imposed by the West Virginia Supreme Court of Appeals in this case precluded Mr. Leavitt from securing the benefits of appellate review and can be used to bar the courthouse doors to anyone else who is unable to post a multimillion-dollar bond as a precondition to appealing from an executable judgment. Such a requirement creates a substantial risk both of erroneous deprivation of property and of wrongful imposition of punishment. *Cf. Honda*, 512 U.S. at 432 ("Punitive damages pose an acute danger of arbitrary deprivation of property"). A recognized alternative—the time-honored rule that allows an appeal to proceed from an executable judgment without posting a bond—ameliorates that risk.

Third, the State of West Virginia or its courts would suffer no fiscal or administrative burdens if an "appeal bond" were not required as a prerequisite to an appeal from an executable judgment. The expenses associated with an appeal are secured by a separate "cost bond" posted by the appellant. *See Robertson* v. *Goldman*, 369 S.E.2d 888, 892 n.4 (W. Va. 1988) ("such bond is

---

court to $5,000,000 and further remitted by appellate court to $350,000); *Lee* v. *Edwards*, 101 F.3d 805 (2d Cir. 1996) (remitting $200,000 punitive damages award to $75,000); *Continental Trend Resources, Inc.* v. *OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996) (remitting $30,000,000 punitive damages award to $6,000,000), *cert. denied*, 117 S. Ct. 1846 (1997); *Foremost Ins. Co.* v. *Parham*, 693 So. 2d 409 (Ala. 1997) (remitting $3,000,000 punitive damages award to $60,500); *Shippen* v. *Parrott*, 553 N.W.2d 503 (S.D. 1996) (remitting $113,000 punitive damages award to $25,000).

posted to assure that costs are paid by an appellant who fails to prosecute the appeal with effect") (internal quotation omitted). Neither the State nor the courts of West Virginia stand to benefit from a separately posted "appeal bond," and therefore there is no governmental interest in requiring an appellant to post such a bond as a prerequisite to appealing from an executable judgment. And, to the extent the appellee's interests are relevant, an "appeal bond" is entirely unnecessary in the case of an executable judgment. *See Wright* v. *Fields*, 313 N.W.2d 902, 903 (Mich. 1981) ("There is no harm to the interest of the appellee in making the appeal bond only a condition of a stay of proceedings. If the appellant does not file a bond, the appellee may proceed to enforce the judgment.").

In short, the West Virginia Supreme Court of Appeals' requirement, which departs radically from traditional American practice, that an "appeal bond" must be posted before the court will entertain an appeal from a fully executable judgment creates an unjustified risk of erroneous and unlawful deprivation of the property of civil defendants and cannot withstand scrutiny under this Court's established due process jurisprudence.

B. The Imposition Of A Bond Requirement As A Prerequisite To Appealing An Executable Judgment Is Irreconcilable With This Court's Appeal Bond Precedents

The requirement that a litigant post an "appeal bond" to obtain appellate review of an executable judgment not only runs afoul of this Court's general due process jurisprudence, but also conflicts with *Lindsey* v. *Normet*, 405 U.S. 56 (1972), the Court's leading decision on appeal bonds. *Lindsey* involved Oregon's appellate scheme, under which an appellant was required to post a cost bond and, if the appellant elected to secure a stay of execution, a bond securing the

judgment. *Id.* at 74-75. West Virginia law imposes identical requirements. In *Lindsey*, the Court held unconstitutional Oregon's *additional* requirement that an appellant in a forcible entry and detainer action post a bond for twice the rental value of the premises.

The Court held that, although an appeal is not mandated by the Constitution, "[w]hen an appeal is afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Id.* at 77. Oregon's additional bond requirement was unconstitutional under this standard because it did not serve any legitimate state objectives. The State's interest in protecting the appellee's property during the pendency of the appeal was fully served by the traditional bond requirements. *Id.* at 77-78. And the additional bond served to bar nonfrivolous appeals by those who could not afford it without discouraging meritless appeals by others who could afford it. *Id.* at 78.

Lindsey compels the conclusion that the West Virginia Supreme Court of Appeals' requirement that a litigant post a bond before appealing an executable judgment is unconstitutional. Mr. Leavitt has posted a bond for the costs on appeal. He has chosen to forgo a stay of execution and therefore was not required to post a bond securing the judgment. As in *Lindsey*, however, the court has unconstitutionally imposed an additional requirement applicable only to a narrow class of litigants.[6]

---

[6] The class could be as broad as all litigants who appeal from executable judgments or as narrow as all litigants who reside out of state and appeal from executable judgments. The requirement does not apply to all litigants, however, as demonstrated by the fact that the Conatys have appealed from the judgments against them in this very case without being required to post any bond.

The *Lindsey* Court noted that "[w]e do not question here reasonable procedural provisions to safeguard litigated property, cf. *National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37 (1954), or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and *if they are uniformly and nondiscriminatorily applied*." *Id.* at 78 (emphasis added). The fact that only Mr. Leavitt has been required to post an "appeal bond" before the West Virginia Supreme Court of Appeals will consider his appeal demonstrates that this requirement is *not* applied "uniformly and nondiscriminatorily." That is sufficient to render it unconstitutional.

Moreover, the State of West Virginia has no interest in "safeguarding" any property subject to execution by Mr. Kessel. To be sure, state courts have a legitimate interest in the enforcement of their judgments. But Mr. Kessel has attempted to enforce the West Virginia judgment in Virginia and California, where Mr. Leavitt's assets are located, and he continues to litigate the issue in California. Mr. Leavitt's assets have been identified and Mr. Kessel has filed abstracts of judgment against those assets in California. That he has been unsuccessful (thus far) in obtaining any money in Virginia or California is of no moment to the West Virginia courts, which do not have jurisdiction over Mr. Leavitt's assets.[7] A judgment debtor's successful

---

[7] For this reason, the *National Union* case (cited by the Court in *Lindsey*) is inapposite. In *National Union*, the Court held that the dismissal of an appeal as a sanction for contempt of court did not violate due process. 348 U.S. at 43-44. The trial court order that was violated directed the defendant union to transfer assets from California to a receiver in Washington. The Court noted that there was no question as to the state courts' power to enter such an order. *Id.* at 41. Here, not only was there no order directing Mr.

defense of an execution proceeding in another State can no more justify an "appeal bond" requirement than could a judgment debtor's simple inability to pay the judgment.

This Court's observation in *Lindsey* regarding the discriminatory effect of requiring an additional bond is equally applicable here:

> For [those who cannot afford to post the bond], as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent . . . appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant . . . .

Id. at 79. Mr. Leavitt has a number of meritorious challenges to the judgment against him, as the West Virginia Supreme Court of Appeals recognized by granting him leave to appeal, yet that court has refused to consider his contentions solely because of an "appeal bond" requirement that Mr. Leavitt cannot afford to satisfy. Such an "arbitrary and irrational" requirement is unconstitutional. *Id.*[8]

Leavitt to transfer assets to West Virginia and, accordingly, no finding of contempt, there also was no authority to enter such an order.

[8] In addition to being irreconcilable with *Lindsey*, the order dismissing Mr. Leavitt's appeal for failure to post an "appeal bond" is at odds with numerous state and federal decisions holding, in a variety of circumstances, that the right of appeal cannot constitutionally be conditioned on a litigant's ability to post a bond. *See, e.g., Lecates* v. *Justice of the Peace Court*, 637 F.2d 898, 911 (3d Cir. 1980) (invalidating Delaware rule requiring surety bond as condition for appeal from a justice of the peace to a court of record); *Compton* v. *Naylor*, 392 F. Supp. 575, 577-78 (N.D. Tex. 1975) (three-judge court) (invalidating Texas rule requiring appellant to

C. The Bond Requirement Is Irreconcilable With This Court's Precedents Regarding Access To The Appellate Process

The West Virginia Supreme Court of Appeals' requirement that Mr. Leavitt post a multimillion-dollar bond, which he could not afford, before the court would consider his appeal cannot be reconciled with this Court's precedents holding unconstitutional unreasonable monetary limitations on access to appellate courts. Beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), this Court has held that States cannot require indigent defendants to pay for transcripts, or bear other costs, necessary to prosecute an appeal. As Justice Frankfurter explained in that case, "when a State deems it wise and just that convictions be susceptible to

---

post bond for all damages, including attorneys' fees, incurred by appellee on appeal); *Blair* v. *Stump*, 617 P.2d 791, 793-96 (Ariz. App. 1980) (O'Connor, J.) (invalidating requirement that appellant post bond equal to twice yearly rental as condition to appealing from forcible entry and detainer judgment); *Merchants Ass'n* v. *Conger*, 606 P.2d 125, 126 (Mont. 1979) (invalidating requirement that appellant post undertaking for twice the judgment amount as a condition of appeal from justice court to district court); *Jack Spring, Inc.* v. *Little*, 280 N.E.2d 208, 211 (Ill. 1972) (invalidating requirement that appellant post bond as a prerequisite to appeal). In fact, this Court previously noted probable jurisdiction to review West Virginia's double-bond requirement for certain appeals "because it appeared to present a significant issue, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment," but remanded the case to the district court for reconsideration in light of an intervening state-court decision that cast doubt on the continuing importance of the question regarding the constitutionality of the bond requirement. *Patterson* v. *Warner*, 415 U.S. 303, 303 (1974) (per curiam).

review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted innocent persons, forsooth erroneously convicted, from securing such a review." *Id.* at 23 (opinion concurring in the judgment); *see also Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts").

The Court has also held that civil litigants are constitutionally entitled, at least under some circumstances, to access to the courts. *See Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Most recently, in *M.L.B.* v. *S.L.J.*, 117 S. Ct. 555 (1996), the Court held that a state requirement that an appellant pay some $2,000 in record preparation fees before hearing her appeal from a parental termination judgment violated the Constitution. *See also id.* at 570 (Kennedy, J., concurring in the judgment). Taken together, these cases rest, as Justice Black (who dissented in *Boddie*) recognized, "on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, *finance a bond*, risk a penalty, or afford to hire an attorney." *Meltzer* v. *C. Buck LeCraw & Co.*, 402 U.S. 954, 955 (1971) (opinion respecting the denial of certiorari) (emphasis added).

The unconstitutionality of West Virginia's "appeal bond" requirement follows *a fortiori* from these precedents. If a litigant against whom a $250 fine is imposed cannot be required to pay $300 for a transcript to obtain appellate review of his sentence, *Mayer* v. *Chicago*, 404 U.S. 189, 190 & n.1 (1971), then a liti-

gant who has been ordered to pay millions of dollars in punitive damages cannot be precluded from obtaining review by the imposition of a requirement that he post a multimillion-dollar bond that he cannot afford. The Due Process Clause protects property fully as much as the "liberty" interests that this Court found compelling in *M.L.B.* *See Zinermon* v. *Burch*, 494 U.S. 113, 132 (1990). The West Virginia Supreme Court of Appeals' requirement that Mr. Leavitt post a bond to secure appellate review of the executable judgment against him, particularly when other litigants have not been required to post any such bond, is unconstitutionally unreasonable and discriminatory.

D. Requiring Only Out-Of-State Defendants To Post A Bond As A Prerequisite To An Appeal Violates The Commerce Clause And The Privileges And Immunities Clause

While the "appeal bond" requirement offends traditional due process and equal protection principles, it also violates the Commerce Clause and the Privileges and Immunities Clause when, as in this case, it is applied only to out-of-state litigants. Mr. Leavitt and the four Conaty defendants presented a joint defense at trial, and the compensatory damages portion of the judgment is against all of them jointly and severally. Yet the West Virginia Supreme Court of Appeals did not require the Conatys, all of whom are West Virginia residents, to post any bond as a condition to appealing from the judgments against them (which have been stayed pending appeal).[9] The only defendant who was

---

[9] The Conatys disclosed their assets to the trial court and agreed not to dissipate them, in exchange for which the trial court stayed the judgments against them. Mr. Leavitt never

required to post a bond was Mr. Leavitt, a California resident.

This Court invalidated a similarly discriminatory scheme in *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988), which involved an Ohio statute of limitations that was automatically tolled in actions against out-of-state defendants. The Court observed that "[w]here a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce." *Id.* at 893. Because "the Ohio statute impose[d] a greater burden on out-of-state companies than it does on Ohio companies, subjecting the activities of foreign and domestic corporations to inconsistent regulations," it violated the Commerce Clause. *Id.* at 894.

The "appeal bond" requirement imposed by the West Virginia Supreme Court of Appeals, which apparently applies only against out-of-state defendants, is facially discriminatory. Moreover, it imposes a burden on interstate commerce—which the practice of law certainly is—by imposing differing obligations on California attorneys (such as Mr. Leavitt) and West Virginia attorneys (such as Ms. Conaty's brother Brian, who is a defendant in this case based in part on his ac-

---

sought a stay of the judgment against him and, therefore, did not disclose his assets in the trial court. When Mr. Kessel raised this issue as a purported justification for the "appeal bond" required by the West Virginia Supreme Court of Appeals, Mr. Leavitt promptly disclosed his assets to that court. He had previously made the same disclosure to Mr. Kessel in the California litigation, as a result of which Mr. Kessel filed liens against Mr. Leavitt's properties.

tions as a lawyer). A State simply cannot, consistently with the Commerce Clause, establish different conditions on its appeal process for out-of-state as compared to in-state defendants.

Congruently, West Virginia effectively has denied to Mr. Leavitt a privilege—an appeal from a judgment—that the State has made available to its own citizens, the Conatys, through the differential imposition of the "appeal bond" requirement. Such preferential treatment of West Virginia citizens, to the detriment of the citizens of California who lose the valuable privilege of having multimillion-dollar judgments reviewed on appeal, cannot stand under the Privileges and Immunities Clause. *Cf. Angel* v. *Bullington*, 330 U.S. 183, 188-89 (1947). The Court has granted review of an analytically similar challenge to discriminatory state laws under the Privileges and Immunities Clause. *Lunding* v. *New York State Tax Appeals Tribunal*, *cert. granted*, 117 S. Ct. 1817 (1997) (No. 96-1462).

* * *

In sum, the West Virginia Supreme Court of Appeals has required Mr. Leavitt, but none of the other defendants in this case, to post an "appeal bond" before considering his appeal from the fully executable judgment against him. Intervention by this Court to reverse the unconstitutional action of the West Virginia Supreme Court of Appeals would clarify the rights of all litigants to equal, nondiscriminatory access to state judicial systems. A decision reversing the order of dismissal also would prevent state courts from refusing to consider federal questions on the basis of arbitrary and *ad hoc* procedural requirements, and would help to ensure that punishment is reserved only for deserving defendants.

The vast majority of tort cases, and punitive damages cases generally, are decided by state courts. *See BMW*, 116 S. Ct. at 1604 n.41; *id.* at 1616-17

(Ginsburg, J., dissenting). This Court should ensure that the state courts do so fairly, uniformly and consistently, and make clear that a court cannot refuse to consider a case on the basis of arbitrary and irrational limitations such as the "appeal bond" required by the West Virginia Supreme Court of Appeals in this case. As explained below, Mr. Leavitt has significant constitutional challenges to the judgment against him; this Court should not allow the West Virginia Supreme Court of Appeals to ignore those challenges by erecting an artificial and unconstitutional barrier to appellate review.[10]

II. The Due Process Clause Prohibits The Exercise Of Personal Jurisdiction Based Only On A Single Telephone Directory Advertisement

For one year (1991), Mr. Leavitt had a paid advertisement in the Huntington, West Virginia telephone directory. During that year, billing records indicate

---

[10]A state-court order dismissing an appeal based on a litigant's failure to conform to state rules of practice sometimes will not support this Court's jurisdiction. *See, e.g., Hammerstein* v. *Superior Court*, 341 U.S. 491, 492 (1951); *Newman* v. *Gates*, 204 U.S. 89, 95 (1907). As noted above, however, the dismissal of Mr. Leavitt's appeal was not authorized under West Virginia law. In any event, even if the West Virginia Supreme Court of Appeals' orders could be construed as implicitly concluding that the court had such authority, it is well-established that this Court has jurisdiction to review dismissal orders if the state court's refusal to accept an appeal in and of itself raises a federal constitutional issue. *Burns* v. *Ohio*, 360 U.S. 252, 256-58 (1959). The sole ground for dismissal in this case was Mr. Leavitt's inability to comply with the "appeal bond" requirement imposed by the West Virginia Supreme Court of Appeals, which, as demonstrated above, was unconstitutional. The Court therefore has jurisdiction to review the decision below.

that several telephone calls were made from West Virginia to Mr. Leavitt's 800 number, primarily from unknown callers. Mr. Leavitt has never had a client from West Virginia. Ms. Conaty, who had left West Virginia prior to retaining Mr. Leavitt, did not contact Mr. Leavitt as a result of the yellow pages advertisement, but rather was referred to him by another California adoption lawyer. Mr. Leavitt is not licensed to practice law in West Virginia and, prior to this lawsuit, had never even been to West Virginia.

The trial court in this case concluded that Mr. Leavitt's yellow pages advertisement was a sufficient basis to support a finding of personal jurisdiction under both West Virginia's long-arm statute and the Due Process Clause. Tr. 2869. The Superior Court of Los Angeles County, California, disagreed, concluding that Mr. Leavitt had insufficient contacts with West Virginia, and therefore that the courts of that State could not constitutionally exercise personal jurisdiction over him. App., *infra*, 24a-27a.

The judgment below cannot be reconciled with this Court's decision in *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408 (1984), in which the Court held that the Texas courts could not exercise jurisdiction over a foreign corporation because the company had insufficient contact with Texas. Although the contacts in *Helicopteros* were far more extensive than Mr. Leavitt's contacts with West Virginia, the Court held that they did not constitute the "continuous and systematic general business contacts" sufficient to satisfy the requirements of the Due Process Clause. *Id.* at 416. To the extent that a State may ever constitutionally exercise jurisdiction over an absent individual defendant, *cf. Burnham* v. *Superior Court*, 495 U.S. 604, 610 n.1 (1990) (plurality opinion), it necessarily follows from *Helicopteros* that Mr. Leavitt's limited and sporadic contacts with West Vir-

ginia cannot, as a matter of due process, support the exercise of personal jurisdiction over him by the courts of that State.

The relationship between advertising and personal jurisdiction is a question of great importance. This Court has held that attorneys (and other professionals) have a constitutional right to advertise their services. *See, e.g., Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982). But the courts of this Nation are sharply divided regarding the question whether the placement of a single such advertisement, or the receipt of a few telephone calls as a result, can subject a defendant to personal jurisdiction in each forum in which the advertisement might circulate. *Compare Cubbage* v. *Merchent*, 744 F.2d 665, 668-69 (9th Cir. 1984) ("a telephone listing, without further solicitation, is not enough in itself to confer jurisdiction"), *cert. denied*, 470 U.S. 1005 (1985), *with Siskind* v. *Villa Foundation for Educ., Inc.*, 642 S.W.2d 434, 436 (Tex. 1982) ("[The defendant's] decision to advertise in Texas telephone directories, in and of itself, is a sufficiently purposeful act that is done in Texas" to support personal jurisdiction).[11] This case, in which

---

[11] *Compare also, e.g., Charlie Fowler Evangelistic Ass'n* v. *Cessna Aircraft Co.*, 911 F.2d 1564, 1565-66 (11th Cir. 1990) (listing in regional telephone directory insufficient contact); *Van Pelt* v. *Best Workover, Inc.*, 798 S.W.2d 14, 17 (Tex. App. 1990) (telephone listing insufficient contact); *Munley* v. *District Court*, 761 P.2d 414, 415-16 (Nev. 1988) (yellow pages listing, newspaper advertisement, billboards and distribution of brochures insufficient contacts); *Kennedy* v. *Ziesmann*, 526 F. Supp. 1328, 1331 (E.D. Ky. 1981) (listing in telephone directory insufficient contact); *Circus Circus Hotels, Inc.* v. *Superior Court*, 120 Cal. App. 3d 546, 566-67 (1981) (newspaper advertisements and 800 number insufficient contacts); *Scheidt* v. *Young*, 389 F.2d

two different courts have reached conflicting conclusions on the same facts, presents an opportunity for this Court to resolve this conflict and to clarify the constitutional limitations on the States' exercise of personal jurisdiction based on advertising activities.

III. The Judgment Should Be Vacated, And The Case Remanded, For Consideration Of The Punitive Damages Award In Light Of *BMW*

This Court recently held, as a matter of constitutional law, that "a State may not impose economic sanctions [*i.e.*, punitive damages] on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW*, 116 S. Ct. at 1597. Mr. Leavitt's conduct was entirely lawful in California, where it took place. Under our federal structure, West Virginia simply "does not have the power . . . to punish [Mr. Leavitt] for conduct that was lawful where it occurred . . ." by requiring him to pay punitive damages for engaging in that conduct. *Id.* This Court's holding in *BMW*, which was announced after the trial court entered judgment in this case, that punitive damages may not be predicated on conduct that

---

58, 60 (3d Cir. 1968) (newspaper advertisement including telephone number insufficient contact), *with, e.g.*, *Balloon Bouquets, Inc.* v. *Balloon Telegram Delivery, Inc.*, 466 N.E.2d 523, 524-25 (Mass. App. 1984) (telephone directory listing, 800 number and solicitations sufficient contacts); *Parris* v. *Garner Commercial Disposal, Inc.*, 253 S.E.2d 29, 34 (N.C. App. 1979) (telephone directory listing, 800 number and correspondence sufficient contacts); *Gregory* v. *Grove*, 547 P.2d 381, 383 (Okla. 1976) (telephone directory listing and correspondence sufficient contacts); *Hull* v. *Gamblin*, 241 A.2d 739, 743 (D.C. App. 1968) (telephone directory listing sufficient contact).

was lawful where it occurred compels the conclusion that the punitive damages award against Mr. Leavitt cannot stand.

The Constitution requires that the punitive damages award against Mr. Leavitt be vacated for a second, and independent, reason. The basis for that award was Mr. Leavitt's alleged interference with Mr. Kessel's parental rights. But until the verdict was announced in this case, such interference was not tortious in West Virginia. As this Court has recognized, "[r]etroactive imposition of punitive damages would raise a serious constitutional question." *Landgraf* v. *USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994). That is because "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *BMW*, 116 S. Ct. at 1598. Because Mr. Leavitt had no notice that his placement of Ms. Conaty's child for adoption could subject him to any punishment in West Virginia, let alone the imposition of a multimillion-dollar punitive damages award, that award violates due process.

Finally, even if *some* punitive damages could be justified in this case, the $5 million award against Mr. Leavitt is unconstitutionally excessive. As this Court has admonished, "[t]hat conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award." *Id.* at 1601. The Court explained in *BMW* that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 1599. Mr. Leavitt's involvement in the Conaty adoption, which was entirely lawful in California and was approved by a Canadian court, is

not the kind of outrageous behavior that constitutionally can support a multimillion-dollar award of punitive damages.

This Court has not hesitated, in the wake of *BMW*, to grant certiorari, vacate the judgment below, and remand punitive damages cases for reconsideration in light of the principles articulated in that case. *See, e.g., Life Ins. Co. of Georgia* v. *Johnson*, 117 S. Ct. 288 (1996); *OXY USA Inc.* v. *Continental Trend Resources, Inc.*, 116 S. Ct. 1843 (1996); *Ford Motor Co.* v. *Sperau*, 116 S. Ct. 1843 (1996); *Combustion Energy, Inc.* v. *Johanssen*, 116 S. Ct. 1843 (1996); *Apache Corp.* v. *Moore*, 116 S. Ct. 1843 (1996). Because the punitive damages award against Mr. Leavitt has never been reviewed under *BMW*, and has never been reviewed by any appellate court, the same treatment is warranted in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Of Counsel:
LONNIE C. SIMMONS
DI TRAPANO & JACKSON
604 Virginia Street, East
Charleston, WV 25301
(304) 342-0133

ROBERT C. BONNER
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Petitioner

July 18, 1997.

Appendix

APPENDIX

Judgment Order in *Kessel* v. *Leavitt et al.*, No. 92-C-2141 (Circuit Court of Cabell County, West Virginia, Dec. 7, 1995)..... 1a
Order Denying Motion for New Trial (Dec. 28, 1995)..... 5a
Order Denying Motion to Alter or Amend Judgment (Dec. 28, 1995) 6a
Order Denying Motion to Review Punitive Damages Award (Dec. 28, 1995)..... 8a
Order on Motion for Stay of Judgment (Dec. 28, 1995)..... 9a
Order Granting Appeal in *Kessel* v. *Leavitt et al.*, No. 23557 (Supreme Court of Appeals of West Virginia, June 26, 1996)..... 13a
Order Requiring $7 Million Bond (Jan. 16, 1997)..... 15a
Order Staying Bond Requirement (Jan. 24, 1997)..... 17a
Order Requiring $1.1 Million Bond (Feb. 6, 1997)..... 19a
Order Denying Reconsideration of Bond Requirement (Feb. 19, 1997) 21a
Order Dismissing Appeal (Mar. 20, 1997)..... 23a
Excerpts from Transcript of Proceedings in *Kessel* v. *Leavitt*, No. SS 006 478 (Superior Court of Los Angeles County, California, Nov. 4, 1996)..... 24a
Order Vacating Judgment (Nov. 5, 1996)..... 27a

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

JUDGMENT ORDER

This action came on for trial on November 13, 1995, before the Court and a jury, Honorable O.C. Spaulding presiding, and the issues having been duly tried and after having maturely deliberated on December 4, 1995, the jury returned its answers to the interrogatories propounded by the Court and its verdict as follows:

INTERROGATORIES

Jury, please answer the following questions:

1. Do you believe by a preponderance of the evidence that Anne Conaty personally knew when she placed Baby Boy Conaty with the Holmstroms that the Circuit Court of Cabell County had entered an order prohibiting her from placing the child for adoption?

Yes X No

Gary D. Berry
Foreperson

2. Do you believe by a preponderance of the evidence that David Leavitt personally knew when Anne Conaty placed Baby Boy Conaty with the Holmstroms that the Circuit Court of Cabell County had entered an order prohibiting her from placing the child for adoption?

Yes X No

Gary D. Berry

Foreperson

JURY VERDICT FORM

The jury is to find for the plaintiff or the defendants. If you find for the plaintiff, you should fill out Part I. If your verdict is for the defendants, then fill out part II.

I. Verdict for Plaintiff

We, the jury, find our verdict for the plaintiff and against the defendant or defendants as set forth below:

A. Liability

1. Fraud Cause of Action

We, the jury, find for the plaintiff and against the following defendants on the fraud cause of action and assess their percent fault as follows:

David Leavitt	55%
Brian Conaty	25%
Anne Conaty Selvaggi	10%
Dr. Thomas Conaty	5%
Eleanor Conaty	5%
Total (total must equal 100%)	100%

2. Tortious Interference Cause of Action

We, the jury, find for the plaintiff and against the following defendants on the tortious interference cause of action and assess their percent fault as follows:

David Leavitt	35%
Brian Conaty	25%
Anne Conaty Selvaggi	30%
Dr. Thomas Conaty	2%
Eleanor Conaty	8%
Total (total must equal 100%)	100%

B. Compensatory Damages

We, the jury, find the damages that the plaintiff has suffered are as follows and we assess damages as follows:

1. The reasonable costs and expenses John Kessel expended in legal fees, investigator fees and other fees in his attempt to locate the child and gain custody of him:

$ 150,000

2. Any mental pain and suffering, anguish and anxiety that plaintiff has undergone to date as a proximate result of the defendants' conduct:

$ 500,000

3. John Kessel's loss of the solace, society, companionship and services of the child that were proximately caused by the conduct of the defendants:

$1,000,000

4. If you believe with reasonable certainty that John Kessel will suffer mental pain and suffering, anguish or anxiety in the future, then future mental pain and suffering, anguish or anxiety may be taken into consideration and you may award an amount to compensate plaintiff for said elements:

$ 350,000

C. Punitive Damages

We, the jury, find and assess punitive damages against the following defendants and in the following amounts:

David Leavitt	$5,000,000
Brian Conaty	$ 500,000
Anne Conaty Selvaggi	$ 250,000
Dr. Thomas Conaty	$ 50,000
Eleanor Conaty	$ 50,000

Gary D. Berry
Foreperson

And the jury on December 4, 1995, rendered its verdict for the plaintiff to recover of the defendants damages in the amounts as set forth above.

It is accordingly ADJUDGED, ORDERED and DECREED that plaintiff recover from the defendants, jointly and severally, the sum of $150,000 with interest

thereon at the rate of 10% per annum from June 1, 1992, until paid and $1,850,000 with interest at the rate of 10% per annum thereon from December 4, 1995, until paid and his costs of this action as compensatory damages.

And the jury having found punitive damages, it is further ADJUDGED, ORDERED and DECREED that plaintiff recover from David Leavitt the sum of $5,000,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid; from Brian Conaty the sum of $500,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid; from Anne Conaty Selvaggi the sum of $250,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid; from Dr. Thomas Conaty the sum of $50,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid; and from Eleanor Conaty the sum of $50,000 with interest thereon at the rate of 10% per annum from December 4, 1995, until paid as punitive damages.

Dated this 7th day of December, 1995.

/s/ Honorable O.C. Spaulding, Judge

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

ORDER (RE: DEFENDANTS' MOTION FOR NEW TRIAL)

On the 27th day of December, 1995, came the parties by their respective counsel on defendants' motion for new trial. The Court, having heard the argument of counsel and having reviewed the motion of the defendants, finds that the motion for new trial should be denied for the reasons as previously set forth on the record of this case as well as for the reasons stated on the record at the hearing on said motion.

It is accordingly ADJUDGED, ORDERED and DECREED that the defendants' motion for new trial be and the same is hereby denied, to which ruling the defendants object.

Dated this 28th day of December, 1995.

/s/ Honorable O.C. Spaulding, Judge

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

ORDER (RE: DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT)

On the 27th day of December, 1995, came the parties by their respective counsel on defendants' motion to alter or amend judgment. The Court, after considering the motion and the grounds therefore and after having heard the argument of counsel, finds for the reasons set forth on the record at the hearing that the compensatory damages be amended with respect to the $150,000.00 award made for costs expended from $150,000.00 to $116,687.47. In all other respects the compensatory damages are found to be supported by the evidence and the same are not excessive as a matter of law or fact.

Thereupon the Court took up the question of punitive damages and upon full and complete review of same based upon the evidence offered at the trial of this case, the Court finds that punitive damages were appropriate as awarded. The Court further finds that the same were not excessive and that said awards were appropriate under the law of the State of West Virginia based upon the evidence in this case.

It is accordingly ADJUDGED, ORDERED and DECREED that the verdict and judgment in this case

be amended by substituting the sum of $116,687.47 for the sum of $150,000.00 which was the compensation for the costs expended by the plaintiff in this matter. Plaintiff objects to this inasmuch as the plaintiff contends that the verdict was supported by the evidence in this respect.

It is further ADJUDGED, ORDERED and DECREED that in all other respects the defendants' motion to amend or alter the judgment in this case with respect to compensatory damages be and the same is hereby denied. The defendant objects to t his ruling.

It is further ADJUDGED, ORDERED and DECREED that the defendants' motion to amend or alter the punitive damages in this case be and the same is hereby denied, all of the above pursuant to the rulings made by this Court of record in this matter. The defendant objects to the rulings of the Court.

Dated this 28th day of December, 1995.

/s/ Honorable O.C. Spaulding, Judge

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

ORDER (RE: DEFENDANTS' MOTION TO REVIEW PUNITIVE DAMAGES AWARD)

On the 27th day of December, 1995, came the parties by their respective counsel on defendants' motion for the Court to conduct a judicial review of the punitive damages made by the jury in this matter pursuant to Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991). Whereupon the Court undertook to review said motion and to consider the arguments of counsel in regard to said motion. The Court, after reviewing the punitive damages award, finds for the reasons noted on the record, that the same is appropriate pursuant to the rulings of Garnes v. Fleming Landfill, Inc. and that said award meets all the criteria established by the Supreme Court of the State of West Virginia for an award of punitive damages by a jury in this State.

It is accordingly ADJUDGED, ORDERED and DECREED that the defendants' motion to strike said punitive damage award be and the same is hereby denied for the reasons set forth on the record of this case. The defendants object to said ruling.

Dated this 28th day of December, 1985.

/s/ Honorable O.C. Spaulding, Judge

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JOHN WOODRUFF KESSEL, and RAY MILLER KESSEL, Plaintiffs,

v. Civil Action No. 92-C-2141

DAVID KEENE LEAVITT, ANNE GILMORE CONATY, ELEANOR WOLFE CONATY, THOMAS J. CONATY, and BRIAN P. CONATY, Defendants.

ORDER (RE: MOTION FOR STAY OF JUDGMENT)

On the 27th day of December, 1995, came the parties by their respective counsel for further hearing on the issue of whether the execution on the judgment heretofore rendered in this case should be stayed pending appeal and for the determination of the bond or other security which should be provided to secure the aforesaid judgment pending appeal in this matter, which said hearing had been held on the 22nd of December, 1995. Whereupon the Court received three exhibits represented to be the financial condition of the defendants Thomas and Eleanor Conaty, Brian Conaty and Anne Conaty which said exhibits were defendants' representations of their assets. No information was provided to the Court by defendant David Leavitt.

Whereupon the Court undertook to hear the arguments of counsel and the evidence presented by the parties with respect to the setting of bond. The Court first considered the bond or security which should be provided by the Conaty defendants pursuant to their motion to stay the enforcement of the judgment.

Whereupon the said defendants, by counsel, offered the following as an alternative to or in lieu of bond:

1. The Conaty defendants will retain and not dispose of any assets that they may own pending appeal of this matter, and if the appeal is denied, pending satisfaction of the judgment, interest and costs in this action;

2. Within ten days from December 27, 1995, the Conaty defendants will provide verified lists of all assets, tangible and intangible, real and personal, which they own in whole or in part, anywhere including any state in the United States or in any other country. This information will be provided to plaintiff on a form as provided and required by the U.S. Bankruptcy Court for the listing of assets, the same as if it would be subject to a bankruptcy proceeding;

3. The Conaty defendants will make themselves available pursuant to the West Virginia Rules of Civil Procedure for questioning by deposition, interrogatory or request for documents in aid of execution for discovery of their assets; and

4. The defendants will cause any financial institution, corporation or person who may hold any asset of defendants, in whole or in part, to execute and provide to plaintiff an agreement that said assets will be held for the benefit of satisfaction of said judgment in the event that the appeal that the defendants intend to prosecute is not successful.

The plaintiff in this matter has requested that bond be required of the defendants to provide security bond for the entire amount of the judgment. The Court, however, finds in its discretion that in lieu of bond the defendants may provide security in the manner as heretofore offered by them as long as they comply with the Court's requirements which are as follows:

It his hereby ADJUDGED, ORDERED and DECREED that the judgment in effect in this case by

[*sic*] stayed so long, and only so long, as the following requirements are met:

1. Thomas Conaty, Eleanor Conaty, Brian Conaty and Anne Conaty shall, within ten days of December 27, 1995, provide individual affidavits which shall set forth all of their assets, tangible and intangible, real and personal, on a form which includes all those matters which are required by the U.S. Bankruptcy Court for persons who are applying for bankruptcy. The aforesaid information shall remain confidential and shall be used only for purposes of this proceeding;

2. Said defendants shall make themselves available for depositions pursuant to the West Virginia Rules of Civil Procedure, and in addition, they shall comply with the West Virginia Rules of Civil Procedure for interrogatory and request for documents. The time period for such shall be reduced to a response time of tend days of service of notice on their counsel;

3. Within ten days of December 27, 1995, said defendants shall cause to be signed by any financial institution, any corporation or any person who holds assets for or on behalf of said defendants, in whole or in part, that they will hold and retain and not dispose of or waste said assets pending the outcome of this appeal. Should said appeal be denied or the judgment be affirmed, said assets would be available and paid over to the plaintiff in this matter for satisfaction of the judgment, interest and costs of this proceeding; and

4. Pending the outcome of the appeal, the income from said assets as represented to the Court and in the amounts as represented to the Court as being the income shall be paid over to defendants Eleanor and Tom Conaty for their living expenses pending appeal. However, the Conaty defendants shall not dispose of or waste any asset or property of any nature or kind.

It is further ORDERED that should the information provided by the Conaty defendants not be accurate or

should they not cooperate as required by their agreement and as by the order of the Court, that the plaintiff may reapply to the Court by motion for bond to be required by said defendants.

Whereupon the Court considered bond for defendant David Leavitt. It appearing to the Court that no evidence had been offered by said defendant Leavitt of his financial condition, and although his counsel had made representations as to his approximate worth, no financial statement was provided and no offer was made by said defendant to provide security by bond or otherwise at the hearing on this date. The Court, after considering the evidence in this case and after considering the judgment and the situation of the parties, particularly that the defendant has no assets in the State of West Virginia, that he is not a resident of the State of West Virginia, that he has made no offer in any way to provide security for the judgment, it is ADJUDGED, ORDERED and DECREED that the stay of the execution of the judgment in this matter be granted to said defendant David Keene Leavitt upon posting with the Circuit Court of Cabell County good and sufficient bond in the amount of Seven Million Dollars to satisfy the judgment, interest and costs in this proceeding.

Dated this 28 day of December, 1995.

/s/ Honorable O.C. Spaulding, Judge

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of June, 1996, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, May 3, 1996, came the petitioners, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Cabell County, rendered on the 28th day of December, 1995, with the record accompanying the petition. Thereafter, on the 19th day of June, 1996, came the respondents, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal. It is hereby ordered that this proceeding be submitted, heard and determined upon the original record, typewritten briefs and oral argument if requested by the parties. It is further ordered that the appellants file an original and nine copies of a brief on or before the 5th

day of August, 1996; the appellees to file a like number of briefs on or before the 5th day of September, 1996; and any reply brief deemed necessary to be filed on or before the 21st day of September, 1996.

A True Copy

Attest: /s/ Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 16th day of January, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to wit, January 14, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their motion in writing for leave to file a response to the appellants' reply brief and further, requesting this Court to require the posting of a bond by appellant David Keene Leavitt during the pendency of this appeal, for the reasons stated therein. Thereafter, on the 16th day of January, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion for leave to file a response to the reply brief of the appellants. However, the motion requesting the posting of a bond by appellant David Keene Leavitt is hereby granted. It is therefore ordered that appellant David Keene Leavitt

post a bond in the amount of Seven Million Dollars ($7,000,000.00) in the Circuit Court of Cabell County, with good security to be approved by the Clerk of the Circuit Court of Cabell County, and conditioned according to law, said bond to be posted within ten days following the date of this order. Failure to comply will result in the dismissal of appellant David Keene Leavitt's appeal in this Court.

A True Copy

Attest: /s/ Interim Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of January, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, January 21, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their motion in writing requesting reconsideration of this Court's order entered on the 16th day of January, 1997, requiring appellant David Keene Leavitt to post a bond within ten days in the Circuit Court of Cabell County in the amount of Seven Million Dollars ($7,000,000.00), for the reasons stated therein. Thereafter, on the 22nd day of January, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their written response in opposition thereto. Finally, on the 23rd day of January, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Sim-

mons, their attorneys, and presented to the Court their written reply thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby stay the aforesaid order of this Court entered on the 16th day of January, 1997, requiring the posting of a bond by appellant David Keene Leavitt in the amount of Seven Million Dollars ($7,000,000.00), until further order of this Court.

A True Copy

Attest: /s/ Interim Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of February, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, January 21, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their motion in writing requesting reconsidering of this Court's order entered on the 16th day of January, 1997, requiring appellant David Keene Leavitt to post a bond within ten days in the Circuit Court of Cabell County in the amount of Seven Million Dollars ($7,000,000.00), for the reasons stated therein. Thereafter, on the 22nd day of January, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their written response in opposition thereto. Finally, on the 23rd day of January, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Sim-

mons, their attorneys, and presented to the Court their written reply thereto.

Upon consideration whereof, on the 24th day of January, 1997, the Court stayed its order entered on the 16th day of January, 1997.

On this day came the Court and proceeded to reconsider its order entered on the 16th day of January, 1997, amending said order only insofar it relates to the amount of the required bond. It is therefore ordered that the amount of the bond required to be posted by appellant David Keene Leavitt in the Circuit Court of Cabell County be, and it hereby is, reduced from Seven Million Dollars ($7,000,000.00), to One Million One Hundred Thousand Dollars ($1,100,000.00), representing 55%, or the maximum percentage of comparative fault attributed to such defendant, of the compensatory damages found by the jury below. It is further ordered that the aforesaid bond be posted by appellant David Keene Leavitt in the Circuit Court of Cabell County, and conditioned according to law.

A True Copy

Attest: /s/ Interim Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of February, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, February 11, 1997, came the appellants, David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, by diTrapano & Jackson, and Lonnie C. Simmons, their attorneys, and presented to the Court their motion in writing requesting this Court to vacate and/or reconsider or stay its order entered on the 6th day of February, 1997, wherein the Court reduced the bond required by this Court to be posted in the above-captioned proceeding, to One Million One Hundred Thousand Dollars ($1,100,000.00) from Seven Million Dollars ($7,000,000.00), for the reasons stated therein. Thereafter, on the 18th day of February, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said motion.

A True Copy
Attest: /s/ Interim Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 20th day of March, 1997, the following order was made and entered:

John Woodruff Kessel and Ray Miller Kessel, Plaintiffs Below, Appellees

vs.) No. 23557

David Keene Leavitt, Anne Gilmore Conaty, Eleanor Wolfe Conaty, Thomas J. Conaty and Brian P. Conaty, Defendants Below, Appellants

On a former day, to-wit, March 11, 1997, came the appellees, John Woodruff Kessel and Ray Miller Kessel, by Masters & Taylor, Marvin W. Masters and Paula L. Wilson, their attorneys, and presented to the Court their motion in writing to dismiss appellant David Keene Leavitt from the above-captioned appeal for the reasons stated therein, which being seen and inspected by the Court is hereby granted. It is therefore ordered that appellant David Keene Leavitt be, and he hereby is, dismissed from the above-captioned proceeding.

A True Copy

Attest: /s/ Interim Clerk, Supreme Court of Appeals

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff,

v. No. SS 006 478

DAVID KEENE LEAVITT, Defendant.

TRANSCRIPT OF PROCEEDINGS
November 4, 1996
[Excerpts]

* * *

THE COURT: . . . I find the Defendant Leavitt is entitled to a ruling on his motion to vacate entry in California of the West Virginia judgment.

* * *

One, the first legal principle that I find applicable is that the West Virginia judgment is not entitled to res judicata under West Virginia law, since the judgment is on appeal in West Virginia. And ample authority has been cited by the moving party to support that proposition.

The fact that West Virginia law provides and allows for enforcement while a matter is on appeal in that state, does not somehow provide for a res judicata effect. In other words, the West Virginia judgment is not final. And it is clear from the cases cited that California is obligated to give full faith and credit only if the West Virginia judgment is final.

The third legal principle that has been established, to my satisfaction, is that 1710.40 CCP does allow a Defendant to litigate the issue of whether West Virginia had personam, or personal jurisdiction, over a litigant. In this case, over Defendant Leavitt.

It's clear from the cases cited, amongst which are Brinker, and I'm going to avoid giving the specific citations at this point, these are all California cases. The Commercial Bank case, the Worldwide Imports cases all support that proposition. And if that weren't enough, the comment -- and I think I made reference to this last time. I'm not sure. The law review comment to 1710.40 clearly indicates that one of the defenses to an effort to provide full faith and credit for a foreign state's judgment, is the lack of personal jurisdiction.

* * *

I find that the evidence that I have considered establishes that the West Virginia Court lacked personal jurisdiction over Defendant Leavitt.

The evidence that has been presented to me is insufficient to establish either general jurisdiction or specific jurisdiction over Defendant Leavitt. There's an insufficient showing of the required minimum contacts by Leavitt within the State of Virginia [*sic*], and the requisite nexus between the alleged tortious conduct for which the West Virginia Court imposed liability, and the State of West Virginia.

There's been no showing by Plaintiff, notwithstanding that Leavitt advertised in an 800 directory, or for that matter, that the Yellow Page listing, and I believe it was in the year '91, in Cabel [*sic*] County, West Virginia, does not demonstrate a purposeful availment (sic) by Leavitt of the benefits and/or protection of the West Virginia jurisdiction.

There's an insufficient showing of a physical presence by the Defendant Leavitt in the State of Virginia [*sic*], and an insufficient showing of any acts, tortious or otherwise, performed in West Virginia by Leavitt.

In essence, in order to . . . grant the motion to vacate, [I] find that the exercise of personal jurisdiction over Defendant Leavitt, is violative of the due process rights of Leavitt, and violative of the due process

clause of the U.S. Constitution, and that the exercise of personal jurisdiction by West Virginia over Leavitt, given the facts that have been established, is not fair and reasonable.

* * *

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

JOHN WOODRUFF KESSEL, Plaintiff,

v. No. SS 006 478

DAVID KEENE LEAVITT, Defendant.

ORDER VACATING JUDGMENT

The Motion for Reconsideration of Defendant DAVID KEENE LEAVITT was heard on November 4, 1996 in Department "J" before the Honorable Alan B. Haber, Judge of the Superior Court; Brian L. Dobrin and Deborah R. Bronner of Dobrin & Bronner appeared on behalf of Plaintiff JOHN WOODRUFF KESSEL and Larry R. Feldman and Robert M. Turner of Fogel, Feldman, Ostrof, Ringler & Klevens, A Law Corporation, appeared on behalf of Defendant DAVID KEENE LEAVITT; having considered the papers filed by the parties, and the Court's file herein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the Motion for Reconsideration filed by Defendant is granted and the Judgment entered on March 6, 1996 in this action is hereby vacated on the grounds that the Circuit Court of Cabell County did not have personal jurisdiction of Defendant DAVID KEENE LEAVITT when it entered the Sister State Judgment (upon which the Judgment in this action is based) in an action entitled Kessel v. Leavitt, et al., which is designated as Case No. 92-C-2141 in the files and records of the Circuit Court of Cabell County.

DATED: Nov 05 1996
/s/ Judge Alan B. Haber